ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1170 (Consolidated with Nos. 18-1178, 18-1197, 18-1199)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAMROCK FOODS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petitions for Review of the Orders of the National Labor Relations Board,
366 NLRB No. 107 (June 22, 2018), 366 NLRB No. 117 (June 22, 2018)

PETITIONER'S REPLY BRIEF

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GLOSSARY

ALJ ..... Administrative Law Judge

ALJ-JDW ..... Administrative Law Judge-Jeffrey D. Wedekind

ALJX ..... Administrative Law Judge Exhibit

D&O ..... NLRB's Decision and Order

NLRB Br. ..... National Labor Relations Board Opposition Brief

GCX ..... General Counsel Exhibit

J.A. ..... Joint Appendix

NLRB ..... National Labor Relations Board ("Board")

Shamrock Br. ..... Shamrock Opening Brief

ULP ..... Unfair Labor Practice

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Opening Brief for Petitioner Addendum. Petitioner incorporates herein the relevant statutory provisions listed in the Addendum to its Opening Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Board's arguments suffer from many of the same flaws that plague the underlying Orders. Rather than attempting to support the Orders through relevant facts and case law, the Board continues to rely on erroneous factual assertions, misapprehended testimony, and incorrect legal conclusions. In many instances, the Board fails even to address Shamrock's arguments.

More than that, the Orders are infected by the Board's decision on one hand to countenance the Union's apparent destruction of surreptitious recordings that could exonerate Shamrock and its completely contrary decision to penalize Shamrock for being unable to comply fully with an overly broad subpoena issued less than ten business days before trial. For the reasons discussed below and in Shamrock's Opening Brief, the Board's Orders should be vacated and should not be enforced.

ARGUMENT

I. THE BOARD'S ORDER IN CONSOLIDATED CASE NOS. 18-1170 AND 18-1179 SHOULD BE REJECTED.

A. The Board's Erroneous Adoption of the ALJ's Rulings on Adverse Inferences Infected its Entire Order.

1. The Board's Refusal to Sanction the Union's Apparent Destruction of Surreptitious Recordings of the Events Underlying this Suit Is Arbitrary and Unfounded.

Throughout its brief, the Board accuses Shamrock of ignoring the "context" of the events underlying this case. NLRB Br. at 26, 28, 32, 36, 50-52, 64. But the Board poisoned the well in these proceedings by declining to sanction the Union's apparent destruction of recordings that could have rebutted the Board's claim of a coercive

environment in the Phoenix warehouse. And the Board did so in the "context" of the Union not only failing to petition to revoke Shamrock's subpoena, but actually having its Counsel no-showing trial to avoid answering it. Under these circumstances, the Board's Order must be set aside.

An adverse inference is appropriate where (i) responsive documents exist and (ii) they would have been potentially "controlling, vital or dispositive." *See Peoples Transp. Service*, 276 NLRB 169, 223 (1985). Here, the uncontroverted evidence is that Steve Phipps provided the Union with surreptitious recordings that he and other individuals made in addition to the ones the General Counsel proffered as evidence. J.A. xx (Tr. 590:11-591:25, 593:4-11). There is, accordingly, no question that those recordings exist. Likewise, the Board concedes that the speech violations alleged in this case require it to show an overall coercive environment, *see* NLRB Br. 31, and that it relied on a surreptitious recording the Union did provide for "context" regarding Wallace's discharge, J.A. xx (ALJ-JDW 36:27). Thus, the surreptitious recordings potentially would have been controlling, vital, or responsive.

The Board's sole defense of its failure to sanction the Union's misconduct is that the Union's counsel sent an unsworn letter claiming it had no other recordings in its possession. NLRB Br. 34. Of course, if the Union destroyed the recordings, they would not be in the Union's possession. And of course, this unsworn statement of counsel is not evidence, unlike Phipps's sworn testimony that he provided those recordings to the Union. And the Union's letter is telling for what it does not say: the Union did not dispute that it ***had been*** in possession of additional recordings but offered no explanation for why it no longer possessed them. J.A. xx (ALJX 2, at 23, 25-26).

The Board's decision to countenance, without explanation, the Union's apparent destruction of the surreptitious recordings undermines the legitimacy of the entire proceedings because "the failure of the Board to utilize the evidentiary sanctions available to it presents an issue as to the fairness of the decision making process rather than as to the correctness of the decision itself." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. ("UAW") v. NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972). Given the substantial prejudice that Shamrock suffered because of the Union's intransigence and the Board's refusal to address it, the Board's Order should be vacated.

2. The Board Erred in Adopting the ALJ's Adverse Inferences Against Shamrock.

In contrast to its decision to permit the Union's apparent destruction of recordings that could have exonerated Shamrock, the Board made adverse inferences against Shamrock because it was unable to comply fully with an overly broad subpoena propounded only nine business days before trial. The Board's decision was arbitrary and capricious on its own and doubly so in the "context" of its decision to let the Union off the hook for its apparent destruction of critical recordings.

The standard for evaluating a subpoena request "is whether the demand is unduly burdensome or unreasonably broad." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also NLRB v. Bakersfield Californian*, 128 F.3d 1339, 1342 (9th Cir. 1997) (holding that the NLRB and FTC's subpoena statutes "are close enough to warrant a similar interpretation."). Here, after investigating Shamrock for several months, General Counsel propounded a subpoena demanding 66 categories of documents, many of them exceptionally broad—any document "showing or describing activities…related to

unions generally"—nine business days before trial. *See* Shamrock Br. 21. To comply with this broad request, Shamrock exhaustively searched through extensive records, producing over 3,000 pages of documents while preparing for trial. Shamrock even moved for a continuance of the trial so that it would have time to find and compile the subpoenaed documents. Despite Shamrock's good-faith efforts to comply, the ALJ drew an adverse inference that a floor captain, Art Manning, was a supervisor and prohibited Shamrock from eliciting testimony to refute that point. The ALJ also drew an adverse inference against Shamrock concerning the May 29 wage increase, which further prejudiced Shamrock's defense. The Board's abuse of its subpoena power should be set aside through vacatur of the Board's Orders concerning Manning and the May 29 wage increase, as a party preparing for such a major hearing could not reasonably have complied with these onerous demands in nine business days.

The Board's response fails to justify its actions. First, the Board insists that it found Manning to be a supervisor based on witness testimony, characterizing the ALJ's adverse inference as mere "support." NLRB Br. 39–40, 42. But without the adverse inference, the ALJ specifically found that the witnesses' testimony alone would "***fail[] to satisfy the burden of proof***." J.A. xx (D&O at 15 n.29) (emphasis added). Indeed, in a case that actually considered the relevant evidence, Shamrock floor captains were found ***not*** to exercise Section 2(11) supervisory authority. *See Shamrock Foods, Co.*, 366 NLRB No. 115 at 1, 7 n.8 (2018); *see also* 29 U.S.C. § 152(11). Nor did the adverse inference simply "support" witness testimony—it affirmatively prohibited Shamrock from eliciting testimony to supports its position that Manning was not a supervisor. The Board's attempted recharacterization of its order fails.

Second, the Board fails to show that the standard for an adverse inference was met. As discussed above, an adverse inference is proper only where (i) responsive documents exist and (ii) they would have been potentially "controlling, vital or dispositive." *Peoples Transp. Service*, 276 NLRB 169, 223 (1985). Section 2(11) status depends an individual's ***actual*** authority, not the duties listed in a job description. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). Manning's job description therefore would not be potentially "controlling, vital or dispositive." Here too, the General Counsel elicited testimony regarding Manning's actual duties, yet without the adverse inference failed to prove that Manning was a supervisor. The Board's attempt to support its adverse inference fails here as well.

Finally, the Board failed to explain why it drew an adverse inference against Shamrock but not the Union. "It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them." *UAW*, 459 F.2d at 1341. And the Board cannot simply ignore the existence of the adverse inference rule because "saying that the rule can be ignored for no reason is tantamount to saying that it is not a rule at all." *Id.* at 1346. By failing to explain this arbitrary distinction between Shamrock and the Union, the Board failed to "act within the context of [its] own decisional law, [] consider all the probative evidence put before [it], and [] give reasons for [its] decisions." *Id.* Thus, this Court should grant the petition for review on this point.

B. Wallace's Separation Agreement Is Not an Unfair Labor Practice.

The Board does not dispute that it found a Section 8(a)(1) violation for Wallace's separation agreement based on a theory never litigated at trial and explicitly disclaimed

by General Counsel. *See* 29 U.S.C. § 158(a)(1). As discussed in Shamrock's Opening Brief at 23–24, this aspect of the Order accordingly must be set aside. "The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." *NLRB v. Blake Const. Co., Inc.*, 663 F.2d 272, 279 (D.C. Cir. 1981); Shamrock Br. 24. Given that this theory was ***not litigated***, indeed General Counsel ***explicitly disclaimed it***, the Board erred in reaching this issue. Perhaps recognizing this infirmity, the Board claims that Shamrock's argument on this issue was not preserved because it did not file a motion to reconsider with the Board. But this is not the correct standard.

Indeed, this Court has explicitly rejected the same blanket rule that the Board now urges it to adopt, *i.e.*, requiring a party to file a motion to reconsider to preserve an argument for appeal when the Board renders a decision on a ground not raised by the General Counsel:

> ***The critical inquiry under section 10(e)…is "whether the Board received adequate notice of the basis for the objection."*** Here…despite the fact that the Company's attack on the Board's new application is made for the first time before us, the Board was sufficiently apprised, for the purpose of section 10(e), of the critical issue—whether the Board's ULP findings are supported by substantial evidence. Indeed, in the Company's brief to the Board, it argued that it did not violate the Act because it properly relied on the second decertification petition to withdraw recognition of the Union. It asserted that the decertification petition was not tainted because neither the Stipulation of Facts nor the allegations set forth in the Agreement constituted sufficient evidence upon which the Board could find it had caused employee disaffection with the Union.

BPH & Co. v. NLRB, 333 F.3d 213, 219–20 (D.C. Cir. 2003) (citations and quotation marks omitted) (emphasis added); *see also OCAW Local 1-547 v. NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir. 1988) ("[W]hile the precise issue of retroactivity was not before the Board, the Board necessarily had notice that it was an issue"); *La Porte Transit Co. v. NLRB*, 888 F.2d 1182, 1187 n.3 (7th Cir. 1989) ("We reject the NLRB's reading of [the *ILGWU*[1] footnote]…to require a party to file a motion for reconsideration with the Board asserting errors in the Board's modification of an ALJ's decision."); 29 U.S.C. § 160(e).

Instead of the form-over-substance approach that the Board prefers, this Court has held that "to preserve objections for appeal a party must raise them in the time and manner that the Board's regulations require." *Spectrum Health--Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). "In assessing a claim of forfeiture under § 10(e), the critical question is whether the Board received adequate notice of the basis for the objection. Although briefing and argument before the Board are desirable… section 10(e) does not require such procedures." *Pa. State Corr. Officers Ass'n v. NLRB*, 894 F.3d 370, 376 (D.C. Cir. 2018) (citations and quotation marks omitted). If the Board "responded to—and thereby acknowledged its awareness of—both the relevant exceptions…, this is sufficient to satisfy Section 10(e)." *Id.* at 377.

Here, that is exactly what happened. Shamrock argued in its post-hearing brief that Wallace's separation agreement should be analyzed only as an alleged work rule because the General Counsel denied any intention to pursue an alternate theory. J.A. xx

[1] *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

(Shamrock Post-Hearing Br. 15; Tr. 688-89). After the ALJ ignored the argument, Shamrock presented it again to the Board in its exceptions:

> In addition to the handbook allegations, the ALJ erred in finding that Shamrock violated the Act by "promulgating a work rule" in a severance agreement to former employee Thomas Wallace following his discharge. (ALJD p. 43 lines 28-32, 43-46). The General Counsel affirmed during trial that this allegation is based solely only on the theory of an overly broad work rule…Consistent with the General Counsel's statements at trial, the Complaint alleges only a work rule violation under Section 8(a)(1). (Compl. ¶ 5(r)). The severance agreement is not alleged to violate the Act in any other respect.

J.A. xx (Shamrock Post-Hearing Br. 15). And Member Kaplan specifically agreed with Shamrock and would have dismissed the claim concerning Wallace's separation agreement on this ground. J.A. xx (D&O at 3 n.12). Thus, the Board acknowledged its awareness of Shamrock's argument, and General Counsel's claim that a motion to reconsider is required to preserve the argument is incorrect.

General Counsel provides no other basis upon which to sustain the Board's ruling. Accordingly, enforcement of the Board's Order on this issue should be denied.

C. Shamrock Did Not Unlawfully Threaten Employees.

1. McClelland's May 8 Letter Was a Lawful Communication, Not a Threat of Retaliation.

The Board arbitrarily departed from its own precedent to hold that McClelland's May 8 letter was unlawful, as established even in the Board's cited case law. In *Care One at Madison Ave.*, 361 NLRB 1462 (2014), an employer posted a memorandum titled "Teamwork and Dignity and Respect" after its election victory. The memo expressed

the employer's disappointment that employees were "not treating their fellow team members with respect and dignity" following the election and claimed that some were threatened. *Id.* at 1462–63. The employer warned that it would enforce its workplace violence policy's prohibition against "threats, intimidation, and harassment." *Id.*

The Board found that the memorandum was unlawful based on the way it referred to the union election and the phrase "dignity and respect:"

> [The memorandum] repeatedly referred to the union election 3 days earlier and the "differences" that arose in the workplace during the Union's campaign….The repeated references to the election in the memorandum, and the nonspecific plea for "dignity and respect," terms not mentioned in the Respondent's [workplace violence policy], create an obvious and heretofore unexpressed link between the subject matter of the rule and protected activity.

Id. at 1464. Regarding the employer's argument that "threats, intimidation, and harassment" are not protected activities, the Board found that "any limited invocation of…general rules against harassment [in the memorandum] was more than offset by language responding to and specifically targeting union activity." *Id.* at 1464–65.

In contrast, *McClelland's letter does not reference union solicitation*. The Board seizes upon the "threats, intimidation, and harassment" phrase in the *Care One* memorandum to argue that McClelland's May 8 letter was similarly unlawful. NLRB Br. 51. But this misreads *Care One*. Rather than serving as the basis for the violation in *Care One*, the Board held that this language was not sufficient to "***offset***" repeated references to the union election. 361 NLRB at 1464–65.

The Board similarly relies on *Tawas Industries, Inc.*, 336 NLRB 318 (2001), to argue that the May 8 letter unlawfully solicited employees to report on coworkers' protected

activities. The challenged notice in *Tawas Industries* invited associates to advise management if they had been threatened or coerced for expressing their views on an in-house union's affiliation with an international labor organization. *Id.* at 322. Finding the notice unlawful, the Board noted that "rather than [prohibiting] threats and coercion generally, the Respondent made it clear that it was interested only in finding out and taking 'appropriate action' against employees who exercised their [Section 7] rights."

Here, McClelland's letter invited employees to report ***any*** threatening behavior, not just threats resulting from union discussions. J.A. xx (Tr. 355:8-22). Thus, neither *Care One* nor *Tawas Industries* supports the Board's decision—instead, both opinions underscore the Board's arbitrary departure from its precedent in finding McClelland's May 8 letter unlawful. *C.f. Champion Enterprises, Inc.*, 350 NLRB 788 (2007).

Next, citing *Hawaii Tribune Herald*, 356 NLRB 661 (2011), the Board attempts to manufacture a connection to protected activity by arguing that employees would have linked the May 8 letter to Engdahl and Vaivao's references to employees being "threatened" if they declined to sign an authorization card. NLRB Br. 50.

But *Hawaii Tribune Herald* is inapposite—the challenged rule in that case concerned ***expressly*** prohibited protected activity (surreptitiously recording meetings). Here, in contrast, the "threatening, violent, or unlawfully coercive behavior" referenced in the May 8 letter is ***not*** protected conduct. *Champion Enterprises, Inc.*, 350 NLRB 788 (2007) (threatening employee who declines to sign authorization card is not protected under the Act). And, Engdahl or Vaivao's remarks about employees being "threatened" no more encompassed protected activity than McClelland's May 8 letter. Consequently,

it was arbitrary to presume employees would read McClelland's reference to "threats" as prohibiting anything other than what that term is commonly understood to include.[2]

2. Engdahl's Statements Were Protected Section 8(c) Opinions, Not Unlawful Threats.

The Board departed from its precedent in holding that Engdahl's statements were unlawful threats not protected under Section 8(c) because he did not refer to Shamrock's intentions vis-à-vis bargaining, a necessary predicate for violation in all the Board's cited authorities. 29 U.S.C. § 158(c).

For example, the Board cites *Homer D. Bronson Co.*, 349 NLRB 512, 513 (2007), to argue that Engdahl unlawfully told employees the Union "would hurt" them. NLRB Br. 32. The employer in *Homer D. Bronson* advised employees that union representation would damage rather than protect their job security and repeatedly referred to ***its own union facilities*** that it closed due to labor disputes, causing employees to understand the employer's statements as threats of job loss.[3] Engdahl never impliedly threatened facility closure or job loss by referring to its other facilities, and the Board does not claim otherwise.

The Board similarly cites *Libertyville Toyota* (*Auto Nation, Inc.*), 360 NLRB 1298 (2014), to argue that Engdahl threatened employees with futility by explaining that

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[2] Cases distinguishing between protected solicitation and unlawful threats are similarly irrelevant. There is no claim or evidence that any employee was disciplined for violating the purported "rule" announced in McClelland's letter. Thus, it was unnecessary for Shamrock to explain the difference between threats and legitimate solicitation simply to remind employees that threats have no place in a work environment.

[3] The Board furthermore has recognized that "prediction[s] about what the union might do [are] less threatening…[because the] conduct is within the control of the union and, ultimately, of the employees themselves." *Tawas Industries, Inc.*, 336 NLRB at 322.

bargaining can be protracted. NLRB Br. 32–33. But, although the *Libertyville Toyota* employer did note that negotiations can be time-consuming, the violation in that case resulted from the employer's statement that ***it was refusing to bargain*** with a union certified nearly three years earlier at a different facility. Engdahl never said Shamrock would refuse to bargain.

Finally, the Board cites *Federated Logistics v. NLRB*, 400 F.3d 920 (D.C. Cir. 2005), to argue that Engdahl violated the Act by stating that "the slate is wiped clean" once contract negotiations begin. NLRB Br. 30–31. But, like *Homer D. Bronson* and *Libertyville Toyota*, the holding in *Federated Logistics* was the product of the employer's statements concerning its intention ***to shut down the facility*** and move the work if the union struck following bargaining. *Id.* at 923–24. Engdahl never referred to Shamrock or its intentions.[4] *Homer D. Bronson*, *Libertyville Toyota*, and *Federated Logistics* are thus inapposite.

Aside from these inapposite cases, the Board offers only fragments of arguments. For example, the Board's claim that Engdahl gave "no assurance of good-faith bargaining" misstates the record, as Engdahl specifically addressed the employer's obligation to bargain in good faith during the April 29 meeting. J.A. xx (GCX 12a at 6:11-12). Moreover, although the Board complains that Engdahl's reference to union promises versus guarantees was not sufficiently specific to inform employees that wages and benefits could go up, *see* J.A. xx (GCX 8(a) at 9), the employer's 8(c) right to free speech is not subject to the Board's grammatical whim, *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427–28 (2nd Cir. 1996) (holding that Section 8(c) embodies the employers'

[4] As explained in Section II.D, *infra*, Shamrock was not even aware of the Phoenix organizing campaign at the time of Engdahl's January 28 remarks.

First Amendment Rights to free speech and the Board may not infringe upon those rights); *Westinghouse Electric Corp.,* 232 NLRB 56 (1977). Thus, the Board's holding that Engdahl's statements were not protected under Section 8(c) cannot be reconciled with longstanding precedent and should not be enforced.

D. The Board's Finding that Shamrock Unlawfully Interrogated Employees Ignores Undisputed Facts and Established Precedent.

The Board has long recognized that interrogation allegations—even those involving "casual questioning concerning union sympathies"—require an analysis that is mindful of normal workplace communication to avoid "direct[] colli[sion] with the Constitution." *Rossmore House*, 269 NLRB 1176, 1177 (1984). Consistent with *Rossmore House*, the Board generally declines to find interrogation violations based on brief conversations between low-level supervisors and employees in open work areas. *E.g.*, *In Re Cardinal Home Prod., Inc.*, 338 NLRB 1004, 1009 (2003) (no unlawful interrogation where low-level supervisor who often engaged in friendly discussions questioned employees during brief conversation on plant floor). The Board erred in disregarding this precedent.

For example, it is undisputed that first-line supervisor Jake Myers' conversation with employee Thomas Wallace about a union education video was brief, that it occurred in the open, that Wallace was not aware of the Union campaign at the time, and that Wallace gave Myers an honest response. J.A. xx (BD1 at 2 n.9; TR1 649:14-650:5). The Board insists that this conversation was unlawful because conversations involving first-level supervisors are "all the more threatening," NLRB Br. 35, but the Board in fact generally ***declines*** to find violations in these circumstances. *See, e.g.*, *Toma*

Metals, Inc., 342 NLRB 787, 789 (2004). Although the Board further declares that "other factors point towards a finding of coercion," it does not identify them. NLRB Br. 35.

Similarly, the short conversation between Manager Joe Remblance and two employees was not coercive under Board precedent. It is undisputed that Remblance's question to Steve Phipps and Nile Vose about whether they were on break was short, in a public and open work area, and did not even refer to union activity. Yet the Board claims the finding of unlawful interrogation was appropriate because Remblance had never previously spoken with Phipps during a break. NLRB Br. 36. Again, the Board misstates the record—Phipps admitted that it was ***not*** unusual for Remblance to talk to him during break times. J.A. xx (RX 1 at 43). The Board also argues that Remblance's question was coercive because Phipps had previously announced that he was leading the Union campaign. NLRB Br. 36. But, Phipps' claimed role in the campaign did not give him license to engage in idle conversation during work time. Thus, Remblance's question to Phipps and Vose was both reasonable and non-coercive.

Last, the Board erred in holding that supervisor Karen Garzon coercively questioned employees. Garzon asked two native Spanish speakers on her crew if they wanted her to return a Union flyer they asked her to translate. J.A. xx (TR1 626, 876-77). Again, the Board does not dispute that Garzon is a low-level supervisor, that she was friendly with the employees involved, that the conversation occurred in a common area, and that the interaction was brief, general and not repeated. Implicitly recognizing that this claim is too weak to stand alone, the Board asserts that Garzon's question was coercive against the "backdrop" of other ULP allegations. The Board cannot, however, use a "cumulative effect" argument to convert such inconsequential comments into a

violation of federal law. *See PruittHealth-Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1296 (D.C. Cir. 2018) ("It is true that the Board is required to assess the cumulative impact of alleged incidents of misconduct…. However, in order to make that 'overall judgment,' the Board first reviews and weighs the seriousness of the specific incidents of alleged misconduct.").

In short, the Board departed without explanation from *Rossmore House* and the rule that interrogation claims must be analyzed with an appreciation for workplace realities. Enforcement of the Board's Order should be denied.

E. The Board's Finding that Shamrock Unlawfully Solicited Employee Grievances Is Based on an Unsupported Presumption of Employer Knowledge.

The Board's finding of unlawful solicitation of grievances depends on its predicate finding that Shamrock was aware of the Phoenix organizing activity by no later than January 28, 2015 (the date of the earliest employee roundtable that the Board contends was unlawful). But, the Board fails to identify evidence to support this finding. Instead, it declares—without support—that "Shamrock suspected union activity in the warehouse given the past history of organizing there and the credited testimony that word of the current campaign was 'spreading like wildfire.'" NLRB Br. 45.

The earlier organizing attempt at the Phoenix warehouse occurred in 1998, nearly ***two decades*** before the events in this case. J.A. xx (D&O at 7). Moreover, as the ALJ acknowledged, the Phoenix organizing activity was still covert at the time of the January 28 meeting. J.A. xx (*Id.*). Phipps testified that no cards were distributed at the facility and that involved employees were instructed to say nothing to supervisors. J.A. xx (TR1

498, 613). Therefore, the Board's presumption that Shamrock was aware of the Phoenix campaign on January 28 is unsupported.

The Board also insists that Shamrock's knowledge of the campaign is irrelevant because "an attempt to preemptively restrain union activity is still a restraint on union activity." NLRB Br. 45. In fact, long-standing NLRB precedent permits employers to continue soliciting employee feedback during a union campaign provided it did so before learning of union activity. *See Wal-Mart Stores Inc.*, 339 NLRB 1187 (2003). Enforcement of the Board's Order should be denied.

F. Shamrock Did Not Unlawfully Grant Benefits by Announcing No Layoffs and Granting a Wage Increase.

The Board's holding that Shamrock unlawfully granted benefits to discourage union organizing relies on hyper-technical linguistic arguments and ignores undisputed evidence. For example, the Board claims that Engdahl's April 29 statement confirming no layoffs for 2015 was unlawful because prior communications only characterized the avoidance of layoffs as the company's "goal." NLRB Br. 47. This litigation position is wrong, as the evidence is that Shamrock told employees as early as March that there would be no layoffs for 2015. J.A. xx (GCX 10(a) at 2-4). The Board also ignores the concrete measures Shamrock implemented following its summer 2014 announcement that a 2015 layoff would be avoided if possible. J.A. xx (TR1 737:20-738:17, 739:2-9, 757:5-17). For example, Shamrock stopped hiring in December 2014 to ensure that it would not have excess headcount the following May. J.A. xx (TR1 757:20-758:9). Shamrock continued to keep employees apprised of these efforts throughout the

remainder of 2014 and the beginning of 2015. J.A. xx (TR1 757:5-17). The Board's failure to dispute these facts renders its position unsustainable.

In addition, contrary to the Board's claim that Shamrock failed to provide a legitimate business justification for the announcement's timing, J.A. xx (D&O 1 n.6), it is undisputed that the April 29 announcement was made on the cusp of Shamrock's slow season, when the prior year's layoffs occurred. J.A. xx (Tr. 738; GCX 10(a) at 3). Ignoring this issue, the Board's argument implicitly would leave Shamrock with two options: (i) conduct unnecessary layoffs, or (ii) forego layoffs but conceal that fact from employees. The Act neither requires nor supports such an absurd result.[5]

The Board fares no better on its finding that the May 2015 wage increase was unlawful. It attempts to place the burden on Shamrock to prove its awareness of the affected employees' involvement in union organizing. But NLRB precedent places the burden on the General Counsel to prove that the employer ***was aware*** of organizing activity among the affected employees. *See Field Family Assocs., LLC*, 348 NLRB 16, 18 (2006); *Desert Aggregates*, 340 NLRB 289, 290 (2003). And the burden must remain on the Board, as an employer rarely has certainty regarding the pre-petition parameters of a union's organizing attempt. In fact, the employer is *prohibited from inquiries concerning the extent of union activity*. The Board's contention that an employer must act in accordance with knowledge it is prohibited from seeking is arbitrary and capricious.

[5] General Counsel also appears to argue that Engdahl's April 29 announcement was unlawful because prior communications were verbal rather than in writing. The Act, however, does not require an employer to use a single, constant medium for every employee communication. Not surprisingly, the Board offers no precedent to support such a notion or explanation for why it should be adopted.

G. The Board's Mischaracterizations Are Insufficient To Support Its Unlawful Surveillance Findings.

1. Manning's Attendance at the Denny's Meeting Was Not Unlawful Surveillance.

The Board acknowledges that a low-level supervisor may attend a union meeting, so long as he does so "on [his] own time for non-surveillance purposes." NLRB Br. 38 (quoting *Howard Johnson Motor Lodge*, 261 NLRB 866, 871 (1982)). Citing to *North Hills Office Services*, 344 NLRB 1083 (2005), the Board argues that Manning attended the January 28 Denny's meeting for purposes of surveillance. Again, even the Board's cited precedent reveals the lapses in its arguments.

The supervisor in *North Hills* drove his vehicle around a fast food restaurant watching employees who were attending a union meeting inside. While doing so, he contacted the employer by cellular telephone to report and invited a higher-level manager to meet him there. *Id.* at 1095. The following day, each of the employees who attended the meeting were called into the Operations Manager's office and asked why the meeting was called and who organized it. *Id.* at 1089.

Here, in contrast, there is no evidence that Manning recorded the names of individuals in attendance or that he reported such information to Shamrock. Further, the Board's claim that Manning "position[ed] himself in the parking lot where he could see the attendees coming and going and could be seen by them," NLRB Br. 37, is unsupported—no testimony, no documentary evidence, and no support from the Board or ALJ.[6] The Board's *post hoc* invention to remedy the fatal omissions in its case

[6] Manning testified without contradiction that he went inside the restaurant and that he did not remain in his vehicle. J.A. xx (TR1 968:17-969:8).

should be disregarded, and enforcement of the Board's Order should be denied. *See Music Express East, Inc.*, 340 NLRB 1063, 1076 (2003).

2. Garcia's Review of Lerma's Clipboard Was Not Unlawful Surveillance.

The Board's arguments regarding the incident in which supervisor David Garcia reviewed materials that employee Mario Lerma attached to a Shamrock-owned clipboard similarly miss the mark. An employer does not violate the Act by witnessing Union activity conducted in the open on employer premises. *Roadway Package Sys.*, 302 NLRB 961 (1991). As explained in Shamrock's Opening Brief, Lerma left the clipboard on the forklift he was using with no reasonable expectation of privacy. The Board's finding of a violation therefore should be overturned.

H. The Board Erred in Holding That Wallace's Discharge Violated Section 8(a)(1).

The most notable aspect of the Board's arguments on Wallace's discharge is its half-hearted defense of the ALJ's finding that CEO Kent McClelland participated in the decision.[7] NLRB Br. 57. The only evidence the Board offers to support this finding is Wallace's testimony that Vaivao said McClelland directed the termination. *Id.* But, Vaivao testified that he had no personal knowledge concerning this issue, J.A. xx (TR1 154), and General Counsel, the ALJ and the Board all failed to identify evidence to the contrary. Indeed, Shamrock specifically noted this flaw in its Opening Brief, and the

[7] It is unclear whether the Board adopted this holding, as the Board's Order makes no reference to this finding and specifies that the ALJ's recommended decision was adopted "only to the extent consistent with [the Board's] Decision and Order." J.A. xx (D&O at 1). In an abundance of caution, Shamrock has included this finding in its Petition for Review because it impacts the issue of remedy, see Section III, *infra.*

Board ***still*** has offered no rebuttal. Thus, to the extent the Board adopted the ALJ's finding concerning McClelland's involvement, it did so in error.

The Board's arguments concerning pretext are equally meritless because they adopt findings that the ALJ erroneously predicated on his personal opinions regarding employee discharge. For example, the Board repeats the ALJ's criticism of Daniels for making the decision to discharge Wallace on his own, without speaking to Wallace's supervisor. NLRB Br. 56–57. But, Daniels decided to discharge Wallace for his actions at the March 31 town hall meeting, not his work performance. J.A. xx (TR1 717:2-3). Having personally witnessed Wallace's misconduct, there was no need for Daniels to consult with others.

While the Board may not agree that Wallace's conduct merited discharge, "an employer may discharge [an] employee for any reason, whether or not it is just, as long as it is not for protected activity." *Yuker Constr. Co.*, 335 NLRB 1072, 1073 (2001). Because the ALJ allowed his personal opinions concerning discharge to permeate his analysis of Wallace's case, the Board erred in adopting the ALJ's reasoning.

I. The Board's Argument Concerning the May 5 Meeting with Lerma Ignores the Surrounding Context.

The Board erred in concluding that Mario Lerma was unlawfully disciplined on May 5, and its defense of the decision mainly relies on second-guessing the basis for the discussion. Engdahl and Vaivao met with Lerma after learning that he and other forklift operators were refusing to deliver and/or delaying delivery of items ("drops") to order selectors who did not sign Union authorization cards. J.A. xx (Tr. 238:16-240:2, 743:5-12, 746:11-748:16). Engdahl also testified that his primary concern was the impact such

slowdowns could have on customers. J.A. xx (Tr. 746:19-747:9; 748:5-11). The Board and the ALJ both neglected the issue in their respective decisions.

The Board argues that the Court should similarly ignore the slowdown because Engdahl and Vaivao did not investigate. But, neither Engdahl nor Vaivao regarded the meeting with Lerma as disciplinary.[8] J.A. xx (TR1 240:3-11, 247:14-22, 746:22-47:17). No documentation was placed in Lerma's file, J.A. xx (247:14-22), and Engdahl suggested that Lerma should not let the situation ***escalate*** to disciplinary action. J.A. xx (TR1 238:16-240:2, 743:5-12, 746:11-748:16). Engdahl further testified that he did not regard the reports he received as reports of "harassment"—he simply wanted Lerma to understand the implications if circumstances worsened. J.A. xx (TR1 746-49). Thus, even accepting the Board's flawed finding that the meeting was disciplinary, the lack of an investigation is neither probative nor sufficient to establish pretext. The Board's finding of unlawful discipline should therefore be rejected.[9]

[8] While Shamrock contests the Board's finding that the May 5 meeting was disciplinary for the reasons explained in its Opening Brief, that finding does not address Engdahl and Vaivao's state of mind. The Board based its finding on the coincidence of Vaivao's use of the word "counseling," which is the same word that Shamrock's handbook uses for the first step in the disciplinary process. J.A. xx (GCX 3 at 64). Even setting aside the form-over-substance nature of this analysis, the Board's reliance on a technical coincidence to find that the May 5 meeting was disciplinary does not mean that Engdahl and Vaivao subjectively intended that result.

[9] The Board argues that Shamrock has not contested its finding that Lerma was unlawfully threatened with discipline during the May 5 meeting. NLRB Br. 28. But Shamrock's opening brief argues that ***no violation*** should be found regarding the May 5 meeting because Engdahl and Vaivao were addressing the potential slowdown intended to coerce employees who did not support the Union. Shamrock Br. 42.

II. THE BOARD'S ORDER IN CONSOLIDATED CASE NOS. 18-1197 AND 18-1199 SHOULD BE REJECTED.

A. Meraz Was Lawfully Disciplined for Failing to Follow Put-Away Procedures.

1. The Evidence Does Not Support the Board's Conclusion on Why Meraz Was Disciplined.

Meraz was lawfully disciplined for failing to follow put-away procedures, which resulted in a customer missing a full pallet of specially-ordered product, and the Board fails to provide evidence rebutting this. Its defense is both untenable and unsupported.

First, the Board's decision departs from NLRB precedent that the ability to impose discipline and to decide the scope of discipline is fundamentally a management function. *Neptco Inc.*, 346 NLRB 18, 20 & nn.15-16 (2005). The Board lacks authority to judge such managerial decisions. *Midwest Regional Joint Bd. v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977). This is because "[i]n passing the Act, Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient." *NLRB v. Fla. Steel Corp.*, 586 F.2d 436, 444–45 (5th Cir. 1978); *see also Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001) ("**[The Board] cannot function as a ubiquitous 'personnel manager,' supplanting its judgment…for [that] of an employer.**") (emphasis added).

As outlined in its Opening Brief, Shamrock has presented extensive evidence to support its good-faith belief that Meraz failed to follow Shamrock's put-away procedures, including that (1) Meraz was the last associate on record to touch the pallet,

(2) Meraz admitted at trial that it was possible that he was responsible for misplacing the pallet and that such error was a violation of put-away procedures, (3) Meraz's scan history did not support that his scanner malfunctioned, (4) the missing pallet garnered attention because it was a special order with no replacement and not because of Meraz, and (5) at least five managers independently investigated the situation and reasonably concluded that Meraz was the last to touch the pallet and was therefore responsible. Even if Shamrock were mistaken, "there is no violation if an employer*, even mistakenly*, imposes discipline in the good-faith belief that an employee engaged in misconduct." *Meyers Industries*, 268 NLRB 493, 497 n.23 (1984), *rev'd. on other grounds sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). Thus, the overwhelming evidence shows that Meraz was disciplined irrespective of any union activity because his mistake caused a customer to be without a special order.

2. Shamrock's Investigation is Unassailable.

Attempting to discredit the evidence that Shamrock acted in good faith in issuing the verbal warning to Meraz, the Board contests the "adequacy" of Shamrock's investigation. This argument fails.

The Board is only able to cite an unpublished and inapposite case, *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 F. App'x 656 (D.C. Cir. 2015), to support its position. In *Ozburn-Hessey*, the Court upheld the Board's decision that an employer engaged in discrimination to discourage union membership when it disciplined several employees, including discharging two of them, without conducting ***any*** investigation. In contrast, it is undisputed that multiple managers independently investigated how the pallet became missing, and each one reasonably determined that Meraz was at fault.

Specifically, Daniel Santamaria went with Meraz to inspect the location of the incident to better understand Meraz's side of the story. J.A. xx (TR2 52-53, 59, 63).[10] Santamaria also evaluated whether the RF scanner worked because Meraz alleged there was an issue with it, and he determined that the RF scanner did not malfunction. J.A. xx (TR2 68-69). Santamaria also solicited and reviewed information from inventory control; discussed the incident with Gomez and Garcia; and reached his determination based on the available data. J.A. xx (TR2 70-71, 77).

In addition, four other managers also investigated. This includes Vaivao who reviewed the nightly shipping report; discussed the incident with Gomez and Nicklin; evaluated how the short occurred; evaluated evidence provided by Gomez and Nicklin; reviewed the scanner records; reviewed the video footage; provided information to Santamaria for review; and discussed the incident with Meraz and Santamaria. J.A. xx (TR2 118-119, 122-125, 128, 135-136, 266-268, 283). Gomez reviewed the missing pallet report; discovered from the scanner records that Meraz was the last person to handle the pallet; investigated and found the missing pallet; informed Vaivao; and recommended discipline. J.A. xx (TR2 363-366; 375). Garcia reviewed emails about the incident; conferred with Gomez; reviewed Meraz's scans to identify the location; watched the video footage; and discussed with Santamaria. J.A. xx (TR2 271, 338-339, 344). Finally, Nicklin evaluated how the pallet was misplaced; reviewed the video footage; and concluded the video showed Meraz alone handling the pallet, J.A. xx (TR2 457, 485–86).

[10] Meraz did not give Santamaria an explanation for why the pallet was missing or how it ended up in a different spot. J.A. xx (TR2 57, 59).

Given the breadth of Shamrock's investigation, the Board's suggestion that the investigation was inadequate is untenable based on long-established precedent. In *Gaylord Hospital*, 359 NLRB 1266 (2013), the Board adopted the ALJ's decision that the employer did not violate Section 8(a)(1) by suspending and discharging an employee by distinguishing cases where there was no investigation or interview before discipline. Here, there was both a thorough investigation and Meraz received an opportunity to discuss the situation with Santamaria before receiving the verbal warning. *See Wal-Mart Stores, Inc.*, 349 NLRB 1095 (2007) (adopting the ALJ's decision that terminating an employee was not pretext despite an inadequate investigation and no interview with the terminated employee).

The Board's focus on whether the scanner malfunctioned as a reason why the investigation was inadequate is equally specious. The Board claims that Meraz explained to Shamrock management that the "the question [he] raised was not just whether his own scanner malfunctioned, but whether subsequent moves by others did not register in the system because of problems with their scanners." NLRB Br. 72. In fact, as the General Counsel concedes, Vaivao, the decision maker, "did not fully understand" that this was the issue Meraz attempted to raise. NLRB Br. 72. Vaivao's mere failure to understand a poorly raised issue is, at best, the type of mistaken discipline that does not constitute a violation. *See Meyers Industries*, 268 NLRB at 497 n.23.

Likewise, the Board's reliance on whether Santamaria questioned the inventory clerk who searched for the pallet also fails. "[I]t is not within the province of the Board to tell an employer how to investigate allegations of employee misconduct. The fact that an employer does not pursue an investigation *in some preferred manner* before

imposing discipline does not establish an unlawful motive for the discipline." *Chartwell's, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004) (rejecting the argument that an employer's investigation was inadequate for not questioning a witness to the incident in question).

Finally, the alleged confusion by Vaivao regarding when the pallet was received is nothing more than a red herring and addressed in Shamrock's Opening Brief. Shamrock Br. 68–69. Notably, Meraz was also confused on this issue and incorrectly testified that the pallet was received four days before its scheduled delivery.

3. The Board Ignored the Evidence that Other Employees Were Similarly Disciplined for Similar Misconduct.

The Board's attempt to claim that no other Shamrock employee was similarly disciplined for ignoring put-away procedures misunderstands the record and indicates the Board's apparent unfamiliarity with Shamrock's business. The Board suggests that Shamrock could not prove similar discipline because another forklift operator has not been disciplined for misplacing a pallet. NLRB Br. 74. But every missing pallet is not the result of failure to follow put-away procedures. For example, a pallet may be "missing" because it is still traversing through the conveyor system despite all procedures being followed. Shamrock's lack of discipline for forklift operators where pallets went missing without put-away procedure violations is irrelevant.

Similarly, the Board suggests that Shamrock's examples of employees disciplined for failing to follow put-away procedures are distinguishable. But the record shows that "failing to follow put away procedures" occurs in the context of other specific job positions and factual situations—violations of put-away policies need not occur in the

same factual context to be similar. Those variables do not change the fact that Shamrock disciplines employees for failing to follow its policies, which is exactly what happened when it reasonably concluded that Meraz's failure to follow its procedures and lost a pallet of special-ordered goods that left a client in a lurch.

B. Phipps Was Not Unlawfully Disciplined.

1. Shamrock Engaged in Lawful Changes to its Break Policy.

The facts support that Shamrock's actions in splitting forklifters into inbound and outbound crews, which required forklifters to break with their respective crew, was nothing more than a lawful operational change that was necessary to the "continual and orderly operation of its business." *Walnut Creek Psychiatric Hosp.*, 208 NLRB 656, 663 (1974) ("The Act does not require an employer pending an election to refrain from making economically motivated decisions involving business matters or any changes in working conditions necessary to the continual and orderly operation of its business.").

The Board does not even allege that the operational change in splitting the forklift drivers back into two crews was unlawful or done for an unlawful reason. Indeed, it admits that "legitimate reasons may exist to require all inbound employees to break together." NLRB Br. 67. Yet, it attempts to impute illegality onto the operational consequence of that change.

The Board's decision and its arguments on appeal also ignore that the practice of employees taking their breaks with their crew was not new. The Board's assertion that in "January 2016 [Shamrock] began telling employees that they were required to breaks at the designed times" is misleading because inbound and outbound crews took breaks together in 2016, 2015, and prior to that. NLRB Br. 63. In *Williams Litho Serv.*

Inc., 260 NLRB 773, 773–74 (1982), the Board held that even were the timing of the employer's action coincides with an organizing effort, where (as is the case here) there are legitimate business considerations and no causal connection to the organizing effort, the employer's actions are not unlawful.

The Board's argument that Shamrock used its break time policy to prevent Phipps from talking to employees about the union during non-scheduled break times is likewise unsupported and legally irrelevant. First, the assertion that Shamrock changed its break policy to interfere with Phipps' distribution of union materials presupposes that Shamrock was aware Phipps used his breaks for that purpose. But the Board failed to present any evidence to establish Shamrock had such knowledge. It was only after mangers reminded Phipps that company policy required him to break with his crew that Phipps stated that he wanted to shift his break to talk with more employees about the union. J.A. xx (TR2 461).

Second, Phipps' attempt to unilaterally refuse to accept the break schedule was not protected activity. *See, e.g.*, *L & BF, Inc.*, 333 NLRB 268, 272 (2001) (finding that employees must work on the terms lawfully prescribed by the employer, lest the employee be able "to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment") (citation and quotation marks omitted); *Bird Eng'g*, 270 NLRB 1415 (1984) (upholding discharge of employees who broke new work rule that prohibiting employees from leaving the workplace during their lunch break, as "treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in

insubordination). Phipps could have engaged in protected activity during regular scheduled breaks and meal periods, but he could not create his own break schedule.

2. Shamrock Did Not Subject Phipps to Closer Supervision.

The Board cannot support its claim that Shamrock singled out Phipps for closer supervision. First, a claim of closer supervision fails where the interaction was consistent with the normal course of business. *Gen. Die Casters, Inc.*, 358 NLRB 742, 746 (2012). Second, a claim of closer supervision fails where employers are observing employees who are openly conducting their activities. *Roadway Package Sys.*, 302 NLRB 961 (1991).

It is undisputed that supervisors frequently walk the floor and were engaged in this routine activity when they came upon Phipps openly working in violation of the break schedule. The Board attempts to muddy the waters in arguing that the "observation that supervisors often are on the floor during break times is beside the point; what matters is not just that they saw Phipps on break, but their unprecedented reaction to it." NLRB Br. 68. In other words, the Board claims that Phipps was unlawfully subjected to closer supervision because Nicklen and Gomez *reported* their conversation with him to Vaivao. But, Nicklen testified that he did so only because Phipps told him that he should check with Shamrock's counsel before directing Phipps to comply with Shamrock's break policy. J.A. xx (TR2 461).

3. Phipps Was Not Disciplined.

The Board's claims to support that Phipps' meeting with Vaivao and O'Meara regarding his breaks times was disciplinary are specious and lack context. It was Phipps who prompted the meeting by insisting to his supervisors he could determine when to

take his breaks. J.A. xx (TR2 461-463). The meeting, therefore, was to explain to Phipps why operationally it was important to take his break according to policy and that it was a rule he must follow. J.A. xx (TR2 160). Merely reminding Phipps to follow Shamrocks' rules was a reasonable response to Phipps telling his supervisors that he had carte blanche to break rules as he pleased, and that Shamrock should check with its counsel. Indeed, by exercising leniency and not disciplining Phipps for his clear insubordination (i.e., his stated refusal to take breaks with his crew) supports that Shamrock was not acting out of any malice for his union activity. *Cellco Partners*, 349 NLRB 640, 665 (2007) (exercising leniency in discipline militates against an unlawful motive); *Avondale Industries, Inc.,* 329 NLRB 1064, 1340–41 (1999).

III. THE EXTRAORDINARY RELIEF REQUIRED IN BOTH BOARD ORDERS SHOULD BE REJECTED.

Finally, the Board claims that a notice reading is appropriate here because some of the purported violations allegedly involved "high-level management officials." NLRB Br. 75. Specifically, the Board relies on its allegations that McClelland's May 8 letter was an improper threat and that Engdahl made unlawful statements during employee meetings on January 28 and April 29. *Id.* Even setting aside the weaknesses of the other ULP findings, the Board's arguments for a notice reading ring hollow.

Notably, in its brief, the Board does not contend that McClelland was involved in Wallace's discharge and relies solely on McClelland's May 8 letter prohibiting "unlawful bullying." *Id.* This limited connection to alleged wrongdoing suggests that McClelland's inclusion in the notice reading is sought for humiliation rather than to effectuate the purposes of the Act. Indeed, the Board's claim that the May 8 letter was

unlawful is based on its argument that employees would have associated the reference to "threats" with Engdahl's earlier statement that employees had been threatened for refusing to sign authorization cards. McClelland was not even present for that conversation. The Board therefore acted arbitrarily by including McClelland in the reading of a remedial notice.

The Board's arguments concerning Engdahl similarly fail. Even setting aside the fact that Engdahl was simply expressing his opinion as protected under Section 8(c), his comments did not threaten job losses, relocation of work, or any of the other critical threats found in the cases on which the Board relies. Thus, the Board's notice reading requirement for Engdahl was arbitrary as well.

CONCLUSION

For the reasons above, the Court should grant Shamrock's Petition for Review and vacate the Board's Decisions and Orders.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a)(7), as amended per the Court order entered on September 19, 2018 permitting up to 9,000 words for Petitioner's Reply Brief, because this brief contains 8,648 words, excluding the parts of the Reply Brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply Brief was filed electronically with the Court by using the CM/ECF system on February 6, 2019. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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